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RESTAURANT CORPORATION

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION  
16

17 MARC SMITH; KEN WHELAN;  
18 individually and on behalf of members of the  
19 general public similarly situated, and as  
aggrieved employees pursuant to the Private  
Attorneys General Act ("PAGA"),

20 Plaintiffs,

21 v.

22 BRINKER INTERNATIONAL, INC., a  
23 Delaware corporation; BRINKER  
24 RESTAURANT CORPORATION, a  
Delaware corporation; and DOES 1 through  
100, inclusive,

25 Defendants.  
26  
27  
28

Case No. C 10 0213 VRW

**DEFENDANTS' REPLY  
MEMORANDUM IN  
SUPPORT OF MOTION TO  
DISMISS**

Date: May 6, 2010  
Time: 10:00 a.m.  
Judge: Hon. Vaughn R. Walker  
Courtroom: 6

1     **I.     INTRODUCTION**

2           As set forth in detail in Defendants' Opening Memorandum, Plaintiffs' First  
3     Amended Complaint fails to meet the pleading standard set forth by the Supreme  
4     Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) because it is entirely lacking in  
5     factual averments and is comprised entirely of conclusory averments that merely  
6     parrot the causes of action and their elements. Plaintiffs' opposition fails to  
7     establish otherwise. In fact, Plaintiffs' opposition – in particular the July 17, 2009  
8     Order in *DeLeon v. Time Warner Cable LLC* (the "*DeLeon* Order") of which  
9     Plaintiffs ask the Court take judicial notice – supports dismissal of the First  
10    Amended Complaint, not the opposite.

11           The *DeLeon* Order (which Defendants cited in their Opening Memorandum)  
12    supports dismissal of Plaintiffs' First Amended Complaint because it reflects that  
13    the *DeLeon* court not only granted a motion to dismiss a complaint that was  
14    virtually identical to the First Amended Complaint in this case, but also that the  
15    *DeLeon* court outright rejected the exact same legal arguments Plaintiffs assert in  
16    their opposition brief here. Indeed, a comparison of Plaintiffs' opposition in this  
17    case to the plaintiff's opposition to the defendant's motion to dismiss in *DeLeon*  
18    reveals that Plaintiffs' counsel (who were also counsel for the plaintiff in *DeLeon*)  
19    merely re-filed their *DeLeon* brief in this case after making a few inconsequential  
20    alterations. (See Plaintiff Saul DeLeon's Opposition to Motion to Dismiss, attached  
21    as Ex. A to Defendants' Request for Judicial Notice filed concurrently herewith.)  
22    Plaintiffs' reassertion of the same arguments that were rejected by the court in  
23    *DeLeon* is fatal to their opposition and mandates dismissal of the First Amended  
24    Complaint. It also amounts to rank bad faith.

25           For the reasons set forth in Defendants' Opening Memorandum and below,  
26    the First Amended Complaint fails to state a claim and should be dismissed.

## II. ARGUMENT

Plaintiffs make three arguments to avoid the dismissal of the First Amended Complaint. None of them is availing, as shown below.

### A. Plaintiffs Rely on Case Law that Has No Current Force.

Plaintiffs first argue that they have sufficiently stated their claims based solely on cases – no less than 15 – that pre-dated the Supreme Court’s decision in *Iqbal*, 129 S. Ct. 1937. (Opp. at 2:11-4:17.) But in holding in *Iqbal* that to satisfy Rule 8(a)(2) and survive a motion to dismiss under Rule 12(b)(6), a complaint must aver actual facts – not mere legal conclusions masquerading as facts – demonstrating a plausible claim for relief (*Iqbal*, 129 S. Ct. at 1949-50), the Supreme Court fundamentally altered the standard of pleading that Plaintiffs were required to meet. Under *Iqbal*, a complaint “that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” (Internal citations omitted.) See *id.* at 1949-50 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

Simply put, Plaintiffs cannot rely on outdated authorities for a standard of pleading that has been superseded by *Iqbal* to avoid dismissal of the First Amended Complaint. Nor do their other arguments save them.

### B. Plaintiffs Erroneously Argue that *Iqbal* Does Not Apply Here.

Plaintiffs next argue that the standard set forth by the Supreme Court in *Iqbal* does not apply to this case. (Opp. at 6:15-7:10.) Incredibly, Plaintiffs make this argument without citation to any authority and despite the fact that both *Iqbal* and the *DeLeon* Order they submitted with their opposition hold directly to the contrary. *Iqbal*, 129 S. Ct. at 1953 (pleading standard applies to “all civil actions”); *DeLeon* Order at 2 (“Plaintiff argues that this Court should not apply the ‘heightened standard’ set forth in *Iqbal*. ... The Court disagrees.”) In fact,

1 Plaintiffs' counsel made the exact same arguments in *DeLeon* regarding the  
 2 inapplicability of *Iqbal* that they are now making here, and the *DeLeon* court  
 3 outright rejected those arguments. (*See DeLeon* Order at 2 and Opp. to Mot. to  
 4 Dismiss at 5:10-7:2, Ex. A to Dfts' RJN.) There is no justification for Plaintiffs'  
 5 continued assertion of an argument in this case that they know to be without merit.  
 6 *See* Fed. R. Civ. Proc. 11.

7 As demonstrated by the *DeLeon* Order, as well as the other cases cited in  
 8 Defendants' Opening Memorandum, which Plaintiffs wholly neglect to address, the  
 9 *Iqbal* standard applies to all civil cases, including putative wage and hour class  
 10 actions such as this one. (*DeLeon* Order at 3 ("The *Iqbal* standard...applies to all  
 11 civil cases.")); *see also, Harding v. Time Warner, Inc.*, No. 09cv1212-WQH-WMc,  
 12 2009 U.S. Dist. LEXIS 72851, at \*8-9 (S.D. Cal. Aug. 18, 2009) (applying *Iqbal*  
 13 standard to grant motion to dismiss wage claims); *Field v. Am. Mortgage Express,*  
 14 *Corp.*, No. C 09-01430 MHP, 2009 U.S. Dist. LEXIS 100063 (N.D. Cal. Oct. 27,  
 15 2009) (same). Plaintiffs' bad faith attempt to argue to the contrary should be  
 16 rejected.

17 **C. Plaintiffs Alternatively – and Equally Erroneously – Argue that**  
 18 **the First Amended Complaint Is Sufficiently Pleaded Under *Iqbal*.**

19 After making an unavailing effort to argue that *Iqbal* does not apply in  
 20 this case, Plaintiffs take the fall-back position that even if it does apply, the First  
 21 Amended Complaint is sufficient to satisfy the *Iqbal* standard. (Opp. at 7:11-8:4.)  
 22 However, Plaintiffs' list of the "factual averments" allegedly contained in the First  
 23 Amended Complaint is entirely devoid of facts and instead constitutes no more than  
 24 a laundry-list of the elements of the various causes of action. (Opp. at 4:24-6:8.) In  
 25 fact, three of the paragraphs quoted by Plaintiffs in their opposition are virtually  
 26 identical to the three paragraphs quoted by the *DeLeon* Court to demonstrate the  
 27 inadequacy of the averments in that action. (*DeLeon* Order at 4-5.)  
 28

Under the standard set forth in *Iqbal*, Plaintiffs cannot survive a motion to dismiss with averments that merely “parrot” the statutory language that forms the basis for the claims. *Iqbal*, 129 S. Ct. at 1949-50 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”); *DeLeon* Order at 5 (deeming insufficient allegations that “simply parrot[] the statutory language”); and see *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (“[B]are assertions . . . amount[ing] to nothing more than a ‘formulaic recitation of the elements’ of a . . . claim’ . . . do nothing more than state a legal conclusion – even if that conclusion is cast in the form of a factual allegation.”). The First Amended Complaint – which is entirely lacking in factual averments – is therefore insufficiently pleaded and should be dismissed.

### III. CONCLUSION

Plaintiffs’ First Amended Complaint fails to satisfy the pleading standard set forth by the Supreme Court in *Iqbal*, and Plaintiffs have not shown otherwise. For all the reasons set forth above and in their Opening Memorandum, Defendants’ motion to dismiss should be granted.

Dated: April 22, 2010

Respectfully submitted,

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By: 

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